High Court of Ireland Decisions

Judgment

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[2018] IEHC 245

THE HIGH COURT
COMMERCIAL
JUDICIAL REVIEW

[2017 No. 745 J.R.]
[2017 No. 197 COM]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000 (AS AMENDED)
BETWEEN
SC SYM FOTOVOLTAIC ENERGY SRL
APPLICANT
AND
MAYO COUNTY COUNCIL
RESPONDENT
AND
AEOLUS WIND FARMS LIMITED
AND
ESB NETWORKS LIMITED
(No. 3)
NOTICE PARTIES

JUDGMENT of Mr. Justice David Barniville delivered on the 4th day of May, 2018

Introduction

1. This is the third judgment which I have given in these proceedings. It concerns an

outstanding issue on costs and the final orders to be made. I gave judgment on 24 January, 2018 (the "first judgment") in which I refused the applicant's application for an extension of time to seek reliefs by way of judicial review in respect of a decision made by the respondent, Mayo County Council (the "Council") on 6 June, 2017 pursuant to s. 5 of the Planning and Development Act 2000 (as amended) (the "2000 Act (as amended)"). The applicant indicated that it wished to appeal my decision to the Court of Appeal. Two issues then arose. The first was whether it was necessary for the applicant to seek a certificate under s. 50A(7) of the 2000 Act (as amended) (the "certificate issue"). The second was whether the special costs provisions contained in s. 50B of the 2000 Act (as amended) applied (the "s. 50B issue").

2. On the first issue, the certificate issue, the parties were all agreed that a certificate was not required, although it was accepted that this was ultimately a matter for me to decide. On the second issue, the s. 50B issue, which only concerned the applicant and the first named notice party, Aeolus Windfarms Ltd ("Aeolus"), the applicant contended that s. 50B applied and that there should be no order as to costs in accordance with section 50B(2). Aeolus contended that s. 50B did not apply and that an order for costs should be made in its favour against the applicant in accordance with the normal rules in O. 99, r. 1 of the Rules of the Superior Courts ("RSC") that costs should follow the event. The Council indicated that it would not be seeking its costs against the applicant or against any other party and was agreeing to bear its own costs. It did not wish to participate in the further hearing in relation to the s. 50B issue and sought to be excused from participation in that hearing. I acceded to that application.

3. The applicant and Aeolus delivered further submissions on the certificate issue and on the s. 50B issue. I heard further oral submissions on 9 February, 2018. I reserved my judgment on both issues.

4. I delivered a second judgment on those issues on 20 February, 2018 (the "second judgment"). In the second judgment, I concluded in relation to the certificate issue that the applicant did not require a certificate under s. 50A(7) in order to appeal against my refusal to extend time for the applicant to apply for leave to seek judicial review in respect of the Council's decision under s. 50(8) of the 2000 Act (as amended). In relation to the s. 50B issue, I concluded that s. 50B does apply to a challenge, or at least a ground of challenge, to a decision under s. 5 of the 2000 Act (as amended) where the case sought to be made is that the public participation provisions of what is now Directive 2011/92 ought to have been applied and that, as a consequence, the procedure under s. 5 was inappropriate. I reached that conclusion in the particular circumstances of the case where, notwithstanding that I refused to grant the extension of time sought, the High Court (Noonan J.) had found that the grounds sought to be advanced by the applicant were substantial and gave leave to the applicant to seek judicial review on those grounds, subject to the requirement on the part of the applicant to seek an extension of time under section 50(8). I then had to consider the appropriate order as to costs in circumstances where the applicant had sought to raise three grounds of challenge in respect of the Council's decision, namely, an EIA/public participation related ground (ground (1)), a fair procedures ground (ground (2)) and an alleged failure by the Council to provide adequate reasons for its decision (ground (3)).

5. I identified two possible orders in relation to costs that I could make. The first was to adopt an approach similar to that taken by the High Court (Herbert J.) *in McCallig v. An Bord Pleanála* [2014] IEHC 353 ("McCallig"). As I explained at paras. 68 and 69 of the second judgment, if I were to apply to apply that approach, I would have held that s. 50B(2) applied to ground (1), the alleged failure to carry out an EIA, but not to the other two grounds sought to be raised by the applicant, namely, grounds (2) and (3), breach of fair procedures and an alleged failure to provide adequate reasons, which were based exclusively on Irish law. I explained that I would have ruled that, in respect

of ground (1), there should be no order as to costs but in respect of the other two grounds, grounds (2) and (3), the ordinary rule in O. 99 RSC should apply and that Aeolus should be entitled to its costs against the applicant in respect of those two grounds. I indicated that the most practical way of implementing that approach would have been to hold that Aeolus would be entitled to two thirds of its costs against the applicant.

6. However, as I explained in my second judgment, Advocate General Bobek delivered an opinion on 19 October, 2017 in *North East Pylon Pressure Campaign Ltd. and Maura Sheehy v. An Bord Pleanála, Minister for Communications, Energy and Natural Resources, Ireland and the Attorney General and Eirgrid plc. C-470/16 ("North East Pylon")* on a reference from the High Court (Humphreys J.). In his opinion the Advocate General expressed the view that it was not appropriate to separate out the grounds of challenge and to apply the requirement in Article 11(4) of Directive 2011/92 that proceedings be "*not prohibitively expensive*" ("NPE") only to that ground or those grounds which engage the public participation provisions of the Directive. He took the view that the NPE requirement applies to all elements of proceedings by which the legality of a decision, act or omission subject to the public participation provisions of the Directive is challenged and that no distinction could be made between those grounds alleging infringement of EU law (including, but not limited to, issues alleging infringement of the public participation provisions) and other grounds raised in the proceedings, including those based on national law.

7. The Advocate General's opinion cast some doubt on whether the approach which I was disposed to adopt in relation to costs, and which was similar to that adopted by Herbert J. in *McCallig*, was permissible as a matter of EU law. As I was informed that the CJEU would be delivering its judgment on the reference in *North East Pylon* on 15 March, 2018, I concluded that it would be appropriate to await the delivery of that judgment before finalising my judgment on which of the two possible orders on costs I should make. I decided, therefore, to list the proceedings for mention before me on 21 March, 2018 by which time it was expected that the CJEU would have given its judgment in *North East Pylon*.

The Judgment of the CJEU in North East Pylon

8. The CJEU did deliver its judgment on 15 March, 2018. Of most relevance to the costs issue arising in the present case are the CJEU's answers to the second, fourth and fifth questions raised. I set out below that Court's answers to those questions and then refer to the further submissions which the parties have made arising from the judgment.

9. In answer to the second question referred by the High Court (Humphreys J.) in *North East Pylon*, the CJEU stated, at para. 44 of its judgment:-

> *"It follows from the foregoing that the answer to the second question is that, where an applicant raises both pleas alleging infringement of the rules on public participation in decision-making in environmental matters and pleas alleging infringement of other rules, the requirement that certain judicial procedures not be prohibitively expensive laid down in Article 11(4) of Directive 2011/92 applies only to the costs relating to the part of the challenge alleging infringement of the rules on public participation."*

10. In answer to the fourth and fifth questions referred, the CJEU stated, at para. 58 of its judgment:-

> *"It follows from the foregoing that the answer to the fourth and fifth questions is that Article 9(3) and (4) of the Aarhus Convention must be interpreted as meaning that, in order to ensure effective judicial protection in the fields covered by EU environmental law, the requirement*

that certain judicial procedures not be prohibitively expensive applies to the part of a challenge that would not be covered by that requirement, as it results, under Directive 2011/92, from the answer given to the second question, in so far as the applicant seeks, by that challenge, to ensure that national environmental law is complied with. Those provisions do not have direct effect, but it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with them."

The Procedure Following CJEU Judgment

11. The parties sought time to consider the CJEU judgment and the matter was adjourned from 21 March, 2018 to 11 April, 2018. On that date, it was agreed that the applicant and Aeolus would exchange further written submissions on the effect of the judgment of the CJEU on the outstanding issue on costs and, in particular, on the issue as to whether I am precluded by that judgment from making the order I was disposed to make, namely, that Aeolus should recover two thirds of its costs from the applicant. It was agreed that I would then consider those written submissions and deliver a further judgment on the issue without the need for further oral submissions. Further detailed written submissions were received from the applicant on 18 April, 2018 and from Aeolus in response on 23 April, 2018. I set out the respective submissions of the applicant and Aeolus below, in somewhat greater detail than might typically be the case in light of the fact that there were no further oral submissions on this outstanding issue. I then set out my conclusions on the outstanding costs issue.

The Applicant's Submissions

12. In its written submissions the applicant refers to what it says are the findings of the CJEU which are relevant to the outstanding issue on costs in this case. At para. 19 of its submissions the applicant relies on the following findings made by the CJEU:-

"(i) that where the Member State had not determined at what stage a challenge may be brought the requirement that certain judicial procedures not be prohibitively expensive was applicable to proceedings which decided that the challenge was premature. At para. 31 the CJEU stated:-

'where national procedural law provides that leave must be sought before bringing a challenge covered by the requirement laid down by Article 11(4) of Directive 2011/92, the costs incurred in a procedure for obtaining that leave must also be covered.'

The CJEU also stated at para. 30:-

'the requirement laid down in Article 11(4) of Directive 2011/92 concerns all the costs arising from participation in the judicial proceedings.'

(ii) that the non-prohibitive cost provisions laid down in Article 11(4) of Directive 2011/92 (which Directive, *inter alia*, gives effect to Article 9(2) and Article 9(4) of the Aarhus Convention) applies only to costs relating to the part of the challenge alleging infringement of the rules on public participation.

(iii) that Article 9(3) of the Aarhus Convention (which concerns the right of the public concerned to procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment) and Article 9(4) of the Aarhus Convention (which provides in particular that such procedures should not be prohibitively expensive) apply to the parts of such judicial proceedings

that would not be covered by Article 11(4) of Directive 2011/92 insofar as the applicant in the proceedings is seeking, by that challenge, to ensure that national environmental laws is complied with."

13. The applicant submits that the judgment of the CJEU precludes me from making a cost order of the type made by Herbert J. in *McCallig*.

14. The applicant further submits that while the CJEU decided that the NPE requirement contained in Article 11(4) of Directive 2011/92 only applies to the costs relating to the part of the challenge alleging infringement of the rules on public participation, the national court is obliged to apply, via a conforming interpretation of national procedural law, Articles 9(3) and 9(4) of the Aarhus Convention to those parts of the proceedings that would not be so covered insofar as the applicant in these proceedings is seeking, by means of its challenge, to ensure that national environmental law is complied with. In this regard the applicant relies on para. 58 of the judgment of the CJEU where that Court stated that while Articles 9(3) and 9(4) of the Aarhus Convention do not have direct effect, national courts are required to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the provisions of Articles 9(3) and 9(4) of that Convention. The applicant notes that at para. 15 of its judgment, the CJEU, the court noted that s. 8 of the Environmental (Miscellaneous Provisional) Act 2011 (the "2011 Act") provides that judicial notice shall be taken of the Aarhus Convention.

15. The applicant submits that I should give consideration to the question of costs "*from the point of view of whether the extension of time was granted in the within proceedings and after a full hearing of the judicial review, the applicant did not succeed in its challenge to the s. 5 declaration on any grounds*" (para. 26 of its submissions). It submits that in that event it would not be open to the court, in accordance with the judgment of the CJEU, to make an order that the applicant and the Council and Aeolus would bear their own costs of litigating the EIA issue and that the applicant should pay the costs incurred by the Council and Aeolus in dealing with the national law grounds. The applicant submits that I should look at the question of costs from the point of view of whether the litigation in general concerned a project which required an EIA and having satisfied myself that it did, I should proceed to order that each side bear its own costs under s. 50B(2).

16. The applicant contends that it is clear from the judgment of the CJEU that the requirement that certain judicial procedures not be prohibitively expensive applies or would apply (if such grounds had been the subject of a determination by the court) in relation to what I characterised, in my earlier judgments in these proceedings as the two non-EIA grounds sought to be advanced by the applicant as I am required in these proceedings, to the fullest extent possible, to give an interpretation to national procedural law that is consistent with the requirements of Articles 9(3) and 9(4) of the Aarhus Convention. In this regard the applicant relies on the decision of Charleton J. in *J.C. Savage Supermarket Ltd. v. An Bord Pleanála* [2011] IEHC 488 (Charleton J.) ("*J.C. Savage*") (although the applicant acknowledges that that case did not involve any EIA element). The applicant also relies on the decision of the Supreme Court in *Conway v. Ireland* [2017] 1 I.R. 53 and contends that the Supreme Court in that case held, inter alia, that it was not appropriate for the court to take an overly technical view of proceedings as formulated for the purpose of deciding whether the Aarhus Convention and/or the directives requiring public participation in environmental matters (such as Directive 2011/92) had been engaged so as, in turn, to determine whether it was necessary to go on to consider whether an entitlement to legal aid might arise (which was the issue in the application the subject of the judgment of the Supreme Court in that case). The applicant notes that the Supreme Court in *Conway* also decided that a court in considering the NPE provisions of the Aarhus Convention and the public

participation directives was entitled to have regard to the question of whether the proceedings had a reasonable prospect of success and that in that case the court found that the applicant's case was unstateable as a matter of national law and that even if the Aarhus Convention had been engaged, it would not be appropriate to require the expenditure of public funds in the provision of legal aid to the applicant.

17. Without prejudice to its primary submission as summarised above, the applicant further submits that it would not be appropriate for me to make a costs order of the type contemplated by me on the basis of grounds on which the order granting leave was made but which grounds were not then argued by the parties (or considered by me) in dealing with the applicant's application for an extension of time under s. 50(8).

18. The applicant further highlights the differences between these proceedings and the *McCallig* case and submits that any contemplated reliance by me on the approach taken by Herbert J. in *McCallig* would be contrary to the decision of the CJEU in *North East Pylon*.

19. In support of its contention that the provisions of the Aarhus Convention, and in particular, Article 9(3) thereof may be required to be implemented as far as practicable by means of a conforming interpretation of national procedural rules, the applicant relies on an extract from the judgment of Clarke J. in the Supreme Court in *Conway* and, in particular, that portion of the judgment in which reference was made by him to the judgment of the CJEU in the Slovak Brown Bear case (*Lesoochranarske Skupenie VLK v. Ministerstvo Zivotneho Prostredin Slovenskej Republiky* Case C-240/09 [2011] ECR I-1255). At paras. 24 and 25 of his judgment, speaking for the Supreme Court, Clarke J. noted that the CJEU in the Slovak Brown Bear case had found that the particular provisions of the Aarhus Convention under consideration were not directly effective but did rule that there remained obligations on the courts of Member States. In particular, while holding that Article 9(3) of the Aarhus Convention does not have direct effect in EU law, the CJEU in that case went on to state as follows at para. 52 of its judgment:-

> *"It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be meet in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that Convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an Environment Protection Organisation … to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU and environmental law."*

20. At para. 25 of his judgment in *Conway*, Clarke J. noted that it was "*at least possible in principle that provisions of the Aarhus Convention may be directly effective in Member States or be required to be implemented as far as practicable by a conforming interpretation of national procedural rules …*"

21. Further, the applicant relies on the observation of Clarke J. in Conway (at para. 63) that, on the basis of comments made by the Compliance Committee established under the Aarhus Convention, that:-

> *"It follows that the question of whether a national law may be a "law relating to the environment" for the purposes of Article 9.3 of the Aarhus Convention must be determined as a matter of substance rather than as a matter of form. It does not matter if the legislation in question deals with other questions or has a title implying that its principal focus may be matters other than environmental provided, importantly, that the measure sought to be enforced can properly be said, in any material and realistic way, to relate to the environment."*

22. The applicant submits that its challenge in these proceedings did relate to the failure by the planning authority (the Council) to take cognisance of and to comply with national environmental law and in particular s. 4(4) of the 2000 Act (as amended) and that, therefore, the NPE requirement "*applies to the entirety of the proceedings (albeit indirectly by the exercise of conforming judicial interpretation of national procedure law insofar as any part of these proceedings is not covered by Article 11(4) of Directive 2011/92 and is instead covered by Article 9(3) and Article 9(4) of the Aarhus Convention*"(para.35 of its submissions). The applicant further submits that the NPE requirement (sourced in Articles 9(3) and 9(4) of the Aarhus Convention would apply "*in relation to any determination by a court of what has been described as the two non-EU grounds of challenge in these proceedings which purportedly do not come within Article 11(4) of Directive 2011/92*". It submits that the contemplated two thirds cost order in favour of Aeolus, if made, would be inconsistent with Articles 9(3) and 9(4) of the Aarhus Convention and that this submission is supported by what the CJEU stated at para. 56 of its judgment in *North East Pylon*. At para. 56 of its judgment in that case, the CJEU stated that:-

> *"[I]f the effective protection of EU environmental law, in this case Directive 2011/92 and Regulation No 347/2013, is not to be undermined, it is inconceivable that Article 9(3) and (4) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law …"*

23. The applicant contends that the NPE requirement applies to the proceedings *in toto*. It refers to ss. 3(1) and 3(2) of the 2011 Act (as amended) (although it is not suggested that these provisions apply to these proceedings) and to ss. 50B(2) and 50B(2A) of the 2000 Act (as amended). This requirement is reflected in or given expression in the State in the general position (subject to certain exceptions) that an unsuccessful applicant or plaintiff will bear its own costs in proceedings to which those provisions apply and that the other party or parties to the proceedings will also each bear their own costs.

24. The applicant contends that if Aeolus were to be awarded two thirds of its costs, it would be "*patently unfair*" for various reasons. The reasons advanced by the applicant are as follows:-

> (i) No statements of opposition were filed in these proceedings.
>
> (ii) The merits of the case (including the merits of the applicant's case in relation to fair procedures and the failure to give reasons i.e. grounds (2) and (3) referred to above) were never considered by me nor were those grounds the subject of any pleadings or submissions filed or made by Aeolus on the extension of time application.
>
> (iii) The only finding made by a court in relation to those two grounds of challenge was that made by Noonan J. who, when granting leave, found that both grounds amounted to "substantial grounds" for the purposes of s. 50A(3)(a) of the 2000 Act (as amended).
>
> (iv) The applicant does not accept that my characterisation of those two grounds (i.e. grounds (2) and (3)) are solely national law grounds which are not related to the EIA ground of challenge (i.e. ground (1). The applicant submits that the fair procedures ground (i.e. ground (2) is "*not necessarily unconnected to the EIA ground of challenge*".

25. The applicant then submits there are various distinguishing features between this case and *McCallig* which it addresses at paras. 38-45 of its submissions. For example, the applicant submits that Herbert J. in *McCallig* was dealing with an application by an unsuccessful respondent and notice party for costs to be dealt with under s. 50B(2) (prior to the insertion of subs. (2A) by s.21 of the 2011 Act). It also notes that one of

the main issues dealt with by Herbert J. *McCallig* was whether the 2011 Act applied retrospectively and he concluded that it did not. The applicant notes that there was a full hearing on all the issues *McCallig* in contrast to the present case. It also says that the court in *McCallig* did not address or deal with the issue as to the extent to which Articles 9(3) and 9(4) of the Aarhus Convention would fall to be engaged in considering the question of the costs of non-EIA planning and development law issues. For those and other reasons the applicant submits that the decision in *McCallig* has "*limited if any application*" to the current issue before me.

26. The applicant submits, therefore, that I should make no order as to costs in the proceedings, that each party should bear its own costs and that if I were to make an order for costs against the applicant in favour of Aeolus it would "*in effect amount to a breach of the access to justice and costs protections envisaged by national and European law*".

Aeolus's Submissions

27. Aeolus relies on the judgment of the CJEU in *North East Pylon* in support of its submission that I should make the cost order which I was proposing to make, for the reasons set out in my second judgment, were it not for the opinion of the Advocate General in that case. It notes that the judgment of the CJEU concerns the scope and interpretation of Article 11(4) of Directive 2011/92 and Articles 9(3) and (4) of the Aarhus Convention and that s. 50B of the 2000 Act (as amended) is the mechanism by which the NPE requirement contained in Article 11(4) in a challenge to "*substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions*" is transposed into Irish law. On that basis, Aeolus submits that the CJEU's interpretation of Article 11(4) of Directive 2011/92 is directly relevant to how I should interpret section 50B. Aeolus refers to and relies on the consideration given by the CJEU to the second question referred to it by the High Court (Humphreys J.). It refers, in particular, to paras. 35, 36 and 39 of the judgment of the CJEU, and in particular, to the statement made by that court that by making an express reference in Article 11(1) of Directive 2011/92 solely to the public participation provisions of that Directive, the EU legislature must be regarded as having intended to exclude from the NPE requirement challenges based on any other rules set out in that Directive or in any other legislation, whether of the European Union or of the Member States (see para. 39 of the judgment of the CJEU).

28. Aeolus also refers to and relies on what the CJEU stated at para. 43 of its judgment, to the effect, that a national court is required to separate out grounds or arguments in a challenge which concerned the rules on public participation contained in Directive 2011/92, from other grounds or arguments. At para. 43 of its judgment, the CJEU stated:-

> *"Where, as is the case of the leave application which led to the main proceedings concerning the determination of costs, a challenge brought against a process covered by Directive 2011/92 combines legal submissions concerning the rules on public participation with arguments of a different nature, it is for the national court to distinguish — on a fair and equitable basis and in accordance with the applicable national procedural rules — between the costs relating to each of the two types of arguments, so as to ensure that the requirement that costs not be prohibitive is applied to the part of the challenge based on the rules on public participation."*

29. Aeolus then relies on the answer given by the CJEU to the second question referred by the High Court (Humphreys J.) which I have set out earlier in this judgment. Aeolus submits that in its answer the CJEU clarified the type of plea that attracts the NPE requirement contained in Article 11(4) of Directive 2011/92 and that the requirement "*applies only to the costs relating to the part of the challenge alleging infringement on*

the rules on public participation".

30. Aeolus submits that the CJEU has made a "*definite distinction*" between a plea as alleging "*infringement of the rules on public participation*" provisions of Directive 2011/92, to which the NPE requirement contained in Article 11(4) of that Directive applies, and all other pleas or grounds of challenge. It submits that the approach taken by the CJEU endorses the approach adopted by Herbert J. in *McCallig* which I was disposed to adopt, were it not for the opinion of the Advocate General in *North East Pylon*.

31. Aeolus submits that it would entirely at odds with the approach required by the CJEU in *North East Pylon* were I to look at the questions of costs from the point of view of whether the litigation, in general, concerned a project which required an EIA and, if I were satisfied that it did, that I should proceed to order that each side bear its own costs.

32. Aeolus further submits that the decision of Charleton J. in *J.C. Savage*, where Charleton J. noted that the litigation "*did not concern a project which required an environmental assessment*", does not support the applicant's contentions in this case and are taken out of context by the applicant in its submissions. Aeolus observes that Charleton J. did not have to consider the issue as to the scope of s. 50B in a case in which infringements of public participation provisions of Directive 2011/92 and other (non-public participation) infringements of that Directive and of other rules were at issue. However, Aeolus does rely on the dicta of Charleton J. at para. 4.1 of his judgment in *J.C. Savage*, where he stated:-

> *"The circumstances whereby the State by legislation grants rights beyond those required in a Directive are rare indeed. Rather, experience indicates that the default approach of the Oireachtas seems to be 'thus far and no further'… Further, the ordinary words of the section make it clear that only three categories of case are to be covered by the new default costs rule. I cannot do violence to the intention of the legislature. Any such interference would breach the separation of powers between the judicial and legislative branches of government. The intention of the Oireachtas is clear from the plain wording of s. 50B and the context reinforces the meaning in the same way. The new rule is an exception. The default provision by special enactment applicable to defined categories of planning cases is that each party bear its own costs but only in such cases…"*

33. Aeolus submits that the CJEU in *North East Pylon* held that the NPE requirement in Article 11(4) of Directive 2011/92, only applies to the narrow category of plea in which the applicant alleges an infringement of the public participation provisions of Directive 2011/92. It further submits that s. 50B should not be interpreted as going any further than what is required by Article 11 of that Directive and that this is consistent with the approach taken by Charleton J. in J.C. Savage. It submits that s. 50B should be interpreted as only applying to the ground of challenge alleging an infringement of the public participation provisions of Directive 2011/92 and not to any other ground of challenge and to interpret that provision more expansively than that would be to "*do violence to the intention of the legislature*" (to adopt the phrase used by Charleton J in *J.C. Savage*).

34. Aeolus then considers the impact of the Aarhus Convention on the interpretation of s. 50B and the approach taken by the CJEU to that issue in *North East Pylon*. It notes that the CJEU held that for those parts of a challenge that are not covered by the NPE requirement in Article 11(4) of Directive 2011/92, there may be an obligation on the part of the national court to interpret national environmental law in a manner consistent with the NPE objectives of the Aarhus Convention. It asserts that the CJEU held, insofar

as a challenge seeks to ensure that national procedural law is complied with, that the national court must interpret national procedural law in a way which, to the fullest extent possible, is consistent with Articles 9(3) and 9(4) of the Aarhus Convention. It submits that by virtue of Article 9(3) and 9(4) of the Aarhus Convention, members of the public must have access to "*administrative or judicial procedures to challenge acts or omissions by private persons and public authorities which contravene provisions of its national law relating to the environment*" which are "*not prohibitively expensive*" and that in that context national procedural law includes national procedural law on costs. Aeolus relies in this regard on what the CJEU stated at para. 58 of its judgment where it set out its answer to the fourth and fifth questions referred by the High Court (Humphreys J.). There, the CJEU stated that Articles 9(3) and 9(4) of the Aarhus Convention must be interpreted as meaning:-

> *"In order to ensure effective judicial protection in the fields covered by EU environmental law, the requirement that certain judicial procedures not be prohibitively expensive applies to the part of a challenge that would not be covered by that requirement, as it results, under Directive 2011/92, from the answer given to the second question, insofar as the applicant seeks, by that challenge to ensure that national environmental law is complied with. Those provisions do not have direct effect, but it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with them."*

Aeolus notes that the CJEU made a similar finding in Slovak Brown Bear case.

35. As to the status of the Aarhus Convention in Irish law, Aeolus refers to a number of authorities including the decision of the Supreme Court in *Conway*, *Waterville Fisheries Development Limited v. Aquaculture Licences Appeals Board (No. 3)* [2014] IEHC 522 (Hogan J.), and *McCoy v. Shillelagh Quarries Limited* [2015] 1 I.R. 627 (Court of Appeal). In essence, what those cases confirm is that as a matter of Irish constitutional law and, in particular, Article 29.6 of the Constitution of Ireland, the Aarhus Convention cannot become part of Irish domestic law save to the extent that it may be "*determined by the Oireachtas*". The Aarhus Convention was not as such made part of domestic law either by virtue of ss. 3 to 7 of the 2011 Act or by virtue of the amendment of s. 50B made by s. 21 of that Act although the Oireachtas sought by these provisions to approximate Irish law to the requirements of Aarhus 9(3) and 9(4). However, it is possible in principle that the provisions of the Aarhus Convention may be directly effective in Member States or be required to be implemented as far as practicable by a conforming interpretation of national procedural rules although not every provision of the Convention is directly effective or capable of such implementation and an assessment would have to be made in respect of any particular provisions sought to be relied on (see, in particular, para. 25 of the judgment of Clarke J. in *Conway*).

36. Aeolus submits that it is not open to a court to interpret s. 50B (or in a case where they are applicable, ss. 3 to 7 of the 2011 Act) beyond its ordinary meaning to compensate for any alleged deficiency in the manner in which the Oireachtas chose to implement or "*approximate our domestic law*" to (to use the words of Hogan J. in the Court of Appeal in *McCoy*), the requirements of Articles 9(3) and 9(4) of the Aarhus Convention would be a matter for the Oireachtas.

37. Aeolus submits that the obligation to interpret national procedural rules, (including national procedural rules on costs) "*to the fullest extent possible*" (as noted by the CJEU in *North East Pylon* at para. 58 of its judgment) does not require or permit a court to put an interpretation on s. 50B which it will not bear. In that regard, Aeolus relies on the decision of the Supreme Court in *Sweetman v. Shell E&P Ireland Ltd*. [2016] 1 I.R. 742.

38. Aeolus further submits that the grounds raised by the applicant in relation to fair

procedures and the alleged inadequacy of the reasons provided by the Council for its decision (i.e. grounds (2) and (3)) are not grounds that relate to the environment and, therefore, are not grounds contemplated by Article 9(3) of the Aarhus Convention and do not attract the NPE requirements of Article 9(4).

39. In this regard, Aeolus refers to the decision of the Supreme Court in Conway and in particular to the observations of Clarke J. as to what is encompassed by the term "*provisions of … national law relating to the environment*" in Article 9(3). Having referred to the views of the Compliance Committee established under the Aarhus Convention as set out in its *Implementation Guide* (2nd ed. 2014), Clarke J. stated as follows, at para. 63 of his judgment:-

> *"It follows that the question of whether a national law may be a 'law relating to the environment' for the purposes of Article 9.3 of the Aarhus Convention must be determined as a matter of substance but rather than as a matter of form. It does not matter if the legislation in question deals with other questions or has a title implying that its principal focus may be matters other than environmental provided, importantly, that the measure sought to be enforced can properly be said, in any material and realistic way, to relate to the environment."*

40. Noting that the plaintiff in those proceedings was seeking, in addition to relief compelling the State to ratify the Aarhus Convention, a range of orders designed to ensure that a portion of roadway be designated as a motorway and that, to the same end, certain portions of the previous roadway be restored, principally to accommodate traffic that would not be permitted to use on motorway, Aeolus refers to certain further observations made by Clarke J. in *Conway* at para. 66 and 67 of his judgment. Clarke J. stated as follows:-

> *"66. It follows that the mere fact that roadways can have an environmental impact and that the purpose of environment legislation can frequently be directed towards protecting health and safety does not mean that all road traffic legislation or all health and safety legislation can be regarded as coming within the ambit of environmental law for the purposes of Article 9.3.*
>
> *67. Against the backdrop of that general analysis and the analysis of the claim which Mr. Conway has brought in these proceedings; I cannot conclude that this claim can be said to amount to an allegation of an omission by a public authority in relation to national environmental law. … The claim as pleaded does not identify any specific national measures as having been breached let alone specify any particular omissions by a public authority of compliance with a mandatory measure which comes within the ambit of environmental law even allowing for the broad definition of that term which I am satisfied ought to be applied in accordance with the guidance of the Aarhus Convention Compliance Committee."*

41. Aeolus submits that applying a similar analysis to the grounds of challenge sought to be made by the applicant in respect of the decision the subject of these proceedings, the grounds relating to fair procedures and reasons (i.e. grounds (2) and (3)) are not challenges that relate to the environment. They are not, Aeolus submits, claims that "*can be said to amount to an allegation of an omission by a public authority in relation to national environmental law*" (to use the words used by Clarke J. at para. 67 of his judgment in *Conway*). Aeolus submits that the applicant's grounds of challenge in respect of fair procedures and reasons do not "*identify any specific national measures as having been breached let alone and specify any particular omissions by a public authority of compliance with a mandatory measure which comes within the ambient of*

environmental law …" (again, per Clarke J. at para. 67 of his judgment in *Conway*). Aeolus, therefore, submits that the grounds sought to be raised by the applicant in respect of fair procedures and reasons do not fall within the type of challenge contemplated under Article 9(3) of the Aarhus Convention.

42. Aeolus further relies on para. 58 of the judgment of the CJEU in *North East Pylon* where, in providing its answer to the fourth and fifth questions referred by the High Court (Humphreys J.), the CJEU stated that Articles 9(3) and 9(4) of the Aarhus Convention had to be interpreted as meaning "*in order to ensure effective judicial protection in the fields covered by EU environmental law*" that the NPE requirement applies to that part or those parts of a challenge that would not be covered by the NPE provisions in Directive 2011/92. Aeolus contends therefore that the obligation to interpret Articles 9(3) and 9(4) of the Aarhus Convention in the manner set out by the CJEU at para. 58 of its judgment only arises where a challenge is seeking to ensure that national environmental law that gives effect to EU environmental law is complied with. Aeolus submits that the grounds sought to be raised by the applicant in respect of fair procedures and reasons are purely a matter of national law and do not form part of national environmental law given effect to EU environmental law.

43. Aeolus, therefore, submits that I was correct in relation to the order which I disposed to make but for the views expressed by Advocate General Bobek in his opinion in *North East Pylon*, and that, in particular, I was correct in my disposition to apply the approach taken by Herbert J. in *McCallig* in separating out the ground which may engage s. 50B from those grounds that do not, and to direct that Aeolus would be entitled to two thirds of its costs against the applicant. Aeolus submits that this approach has been endorsed by the CJEU and that the obligation to interpret Articles 9(3) and 9(4) of the Aarhus Convention as identified by the CJEU in answer to the fourth and fifth questions referred by the High Court (Humphreys J.) does not affect my proposed order. Aeolus further submits that the grounds sought to be raised by the applicant in respect of fair procedures and the alleged inadequacy of reasons are not challenges which relate to the environment and do not give effect to EU environmental law. It submits, therefore, that they not within the types of claims contemplated by Article 9(3) of the Aarhus Convention.

Conclusions on the Costs Issue

44. I have carefully considered the judgment of the CJEU in *North East Pylon* and the helpful written submissions made by the applicant and by Aeolus arising from that judgment, for which I am indebted to counsel. I have come to the conclusion that the costs order which I was disposed to make, for the reasons explained in my second judgment, is the appropriate order to make and that the judgment of the CJEU in *North East Pylon* is consistent with the making of an order in those terms.

45. A notable feature of the submissions advanced by the applicant and by Aeolus on this issue is that each contends that the judgment of the CJEU supports its position and precludes the court from accepting the position erred by the other party. The applicant contends that the judgment of the CJEU precludes me from making the order I was disposed to make, namely, by separating out the one ground raising the alleged infringement of the public participation provisions from the other two grounds alleging breach of fair procedures and inadequate reasons and ordering the applicant to pay two thirds of Aeolus's costs as opposed to the entirety of those costs. I do not accept that the applicant is correct in its contention that such an order is precluded by the judgment of the CJEU. On the contrary, I accept the submission advanced by Aeolus that my proposed order is consistent with the judgment of the CJEU. I set out briefly below why I am satisfied that that is so.

46. As noted in both of my earlier judgments, the applicant had sought to raise three grounds to challenge the Council's decision in this case. The first ground alleged that the

Council erred in law in finding that the development the subject of the proceedings was exempted development in circumstances where it was part of a project which the applicant contended required an EIA (ground (1)). The second ground alleged that the Council failed to comply with fair procedures and failed to respect the property rights of affected landowners by failing to notify them of the making of the application for the s. 5 declaration and affording them an opportunity to make submissions in relation to it (ground (2)). The third ground alleged that the Council erred in failing to give any or any adequate reasons for its decision that the proposed development was exempted development (ground (3)). At para. 60 of my second judgment, I concluded that ground (1) is potentially an EIA based ground and, for the avoidance of any doubt, I confirm that it is a ground which effectively alleges infringement of the rules on public participation contained in Directive 2011/92. Grounds (2) and (3) are, in my view, purely national law grounds. I so found at para. 60 of my second judgment. The applicant has sought, in its further submissions on costs, to argue that these two grounds are not purely national law grounds. I do not accept that submission. The manner in which those grounds were advanced in the amended statement of grounds (at paras. 18 to 25) and in the affidavits sworn for the purpose of grounding the applicant's application for leave to seek judicial review, principally, the affidavit of Simona Bran sworn on 2 October, 2017, do not support the contention now made that these grounds are EIA/public participation related grounds. While this part of the applicant's further submissions on costs does arguably go beyond the scope of the further submissions which I was seeking arising from the judgment of the CJEU, nonetheless, I have considered them. Having done so, I am satisfied that these two grounds are purely national law grounds.

47. The answers given by the CJEU to the second question and to the fourth and fifth questions referred by the High Court (Humphreys J.) in *North East Pylon* are the most relevant to the costs issue which I had to decide.

48. As noted earlier, in answer to the second question referred, the CJEU held that where an applicant raises both pleas alleging infringement of the rules on public participation in decision-making in environmental matters and pleas alleging infringement of other rules (such as rules contained in legislation other than Directive 2011/92, whether made by the European Union or by Member States), the NPE requirement laid down in Article 11(4) of Directive 2011/92 applies only to the costs relating to the part of the challenge alleging infringements of the rules on public participation (see paras. 35 to 44 of the judgment of the CJEU). I agree with Aeolus that the answer given by the CJEU to the second question and the analysis set out by the CJEU in respect of that question support the approach which I was disposed to adopt. In my view, ground (1) is the only ground of challenge which effectively alleges infringement of the rules on public participation in decision-making in environmental matters falling within Article 11 of Directive 2011/92. Grounds (2) and (3) do not allege infringements of those rules on public participation. They allege infringements of national law (fair procedures and alleged inadequacy of reasons). The CJEU has confirmed in its answer to the second question that it is only in relation to those grounds which allege infringement of the rules on public participation in this field that NPE requirement in Article 11(4) applies and that that rule applies only to the costs relating to the part of the challenge alleging infringement of those rules. The answer given by the CJEU to the second question, in my view, fully supports the conclusion that Article 11(4) of Directive 2011/92 and the NPE requirement provided for therein applies only to ground (1) and not grounds (2) and (3). I am satisfied, therefore, that I am not precluded by virtue of Article 11(4) of Directive 2011/92 from adopting the approach I was disposed to make and, from separating out the various grounds as between those grounds which attract the benefit of the NPE requirement from those which do not and from then seeking to give practical effect to that approach by reducing the costs order in

a proportionate way.

49. I do not accept that I am required to apply the NPE requirement to the entirety of the proceedings just because one of the grounds raised may attract the benefit of that provision. That would be contrary to the approach endorsed by the CJEU in *North East Pylon*.

50. I should also say that I do not accept that there is anything in the judgment of Charleton J. in *J.C. Savage* which would preclude the approach which I was disposed to take and the costs order which I was disposed to make. I accept the submission made by Aeolus that *J.C. Savage* was not a case in which it was necessary for the court to consider the costs provision in the context of different grounds of challenge, some of which might potentially engage the NPE requirement in what was then Article 10a of Directive 85/337/EEC (as amended), now Article 11 of Directive 2011/92 and those which would not. Furthermore, I agree that the dicta of Charleton J. as to the ascertainment of the intention of the Oireachtas in enacting s. 50B is applicable by analogy in the context of the interpretation given to Article 11(4) of Directive 2011/92 by the CJEU in *North East Pylon*. I accept the submission advanced by Aeolus that s. 50B should not be interpreted as having a wider or more expansive meaning than is required by Article 11(4) of Directive 2011/92, as that provision has been interpreted by the CJEU in *North East Pylon*.

51. Nor do I believe that the decision of the Supreme Court in *Conway* in any way precludes the approach which I was disposed to take or the costs order I was disposed to make. I do not accept that by taking this approach I would be taking an overly technical view of the proceedings, as submitted by the applicant at para. 29 of its written submissions.

52. That is not however the end of the matter. The applicant contends that although the NPE requirement contained in Article 11(4) of Directive 2011/92 only applies to the costs relating to that part of the challenge alleging infringement of the rules on public participation, I am obliged to apply, by means of a conforming interpretation of national procedural law, Articles 9(3) and 9(4) of the Aarhus Convention to those parts of the proceedings that would not be so covered insofar as the applicant is seeking to ensure that national environmental law is complied with. In support of this contention, the applicant relies on the answer given by the CJEU to the fourth and fifth questions referred in *North East Pylon*.

53. The CJEU dealt with both those questions together. At para. 45 of its judgment it explained that the High Court was asking, in essence, whether and to what extent Articles 9(3) and 9(4) of the Aarhus Convention should be interpreted as meaning that:-

> *"The requirement that, in order to ensure effective judicial protection in the fields covered by EU environmental law, certain judicial procedures not be prohibitively expensive applies to aspects of a dispute which would not be covered by that requirement as it results, under Directive 2011/92, from the answer given to the second question, and, if so, what inferences must be drawn from this by the national court in a dispute such as that in the main proceedings."*

54. In order to consider the approach taken by the CJEU to these questions and the answer which it ultimately provided to them, it is necessary first to set out provisions of Articles 9(3) and 9(4) of the Aarhus Convention.

55. Articles 9(3) and 9(4) of the Aarhus Convention provide as follows:-

> *"3. In addition, and without prejudice to the review procedures referred to*

in paras. 1 and 2 above, each party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to para. 1 above, the procedures referred to in paras. 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."

56. In discussing the issues raised by these questions and in explaining the basis for its answer to them, the CJEU referred to Articles 9(2) and 9(3) of the Aarhus Convention, noting that Article 9(2) lays down the right to a review procedure to uphold the public's right to participate in decision-making in environmental matters and that Article 9(3) is more broad and concerns the right of the public concerned to procedures to challenge acts and omissions by private persons and public bodies which contravene provisions of national law relating to the environment. The provisions of Article 9(4) apply to both the procedures referred to in Articles 9(3) and 9(2). The CJEU then noted that it "*it has repeatedly held, where provision of EU law can apply both to situations falling within the scope of national law and situations falling within the scope of EU law, it is clearly in the European Union's interest that, in order to forestall future differences of interpretation, that provision should be given a uniformed interpretation irrespective of the circumstances in which it is to be applied*" (para. 50). In that context the CJEU referred to the Slovak Brown Bear case and to the case law cited by the court in that case.

57. While noting that neither Article 9(3) nor Article 9(4) of the Aarhus Convention contains any "*unconditional and sufficiently precise obligation capable of directly regulation the legal position of individuals*" (again referring inter alia to the Slovak Brown Bear case), the CJEU went on to state that although those provisions do not have direct effect they are intended "*to ensure effective environmental protection*" (para. 53). The court continued:-

"54. In the absence of EU legislation on the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, it is for the domestic legal system of each Member State to lay down those rules and to ensure that those rights are effectively protected in each case ….

55. On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) ….

56. Therefore, if the effective protection of EU environmental law, in this case Directive 2011/92 and Regulation No. 347/2013, is not to be undermined, it is inconceivable that Article 9(3) and (4) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law …"

58. The CJEU then concluded that:-

"57. Consequently, where the application of national environmental law …

is at issue, it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not prohibitively expensive." (emphasis added).

59. The CJEU then gave its answer to these questions at para. 58 by stating:-

"58. It follows from the foregoing that the answer to the fourth and fifth questions is that Article 9(3) and (4) of the Aarhus Convention must be interpreted as meaning that, in order to ensure effective judicial protection in the fields covered by EU environmental law, the requirement that certain judicial procedures not be prohibitively expensive applies to the part of a challenge that would not be covered by that requirement, as it results, under Directive 2011/92, from the answer given to the second question, in so far as the applicant seeks, by that challenge, to ensure that national environmental law is complied with. Those provisions do not have direct effect, but it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with them." (emphasis added).

60. It is particularly notable that in setting out its analysis and in answering the fourth and fifth questions referred by the High Court in *North East Pylon*, the CJEU referred on a number of occasions to the context being the application of "*national environmental law*" and the aim of the proceedings which attract the benefit of the NPE provisions being to ensure that "*national environmental law*" is complied with. The analysis set out and the answer given to those questions is expressly set out and provided in that context. Neither the analysis nor the answer given imposes any requirement on national courts to apply the requirement that judicial proceedings not be prohibitively expensive to any part of a challenge which would not be covered by the NPE requirement in Article 11(4) which does not involve the application of "*national environmental law*". In my view, the obligation contained in the answer given by the CJEU to the fourth and fifth questions referred by the High Court (Humphreys J.) does not oblige me to apply the NPE provisions of Article 9(4) of the Aarhus Convention to those parts of a challenge which raise purely national law questions which are not concerned with national environmental law, or its application, as is the case here, where those parts concerned an alleged failure to comply with fair procedures and an alleged failure to provide adequate reasons (grounds (2) and (3)). In my view, there is nothing in the judgment of the CJEU in *North East Pylon* and, in particular, in the answer which it gave to the fourth and fifth questions referred which would require me to apply the provisions of Articles 9(3) and 9(4) of the Aarhus Convention and, in particular, the requirement contained in the latter provision that certain judicial procedures not be prohibitively expensive to grounds (2) and (3) raised by the applicant in these proceedings. I do not believe that the obligation to apply a conforming interpretation of national procedural law in the circumstances addressed by the CJEU in its analysis of and answer to the fourth and fifth questions referred applies in relation to those two grounds which do not concern the application of national environment law or its application.

61. The answer given by the CJEU to the fourth and fifth questions is, in my view, fully consistent with the decision of the Supreme Court in *Conway*. In considering whether the Aarhus Convention was engaged at all by the proceedings in that case, Clarke J., speaking for the Supreme Court, while noting that it did not provide a definitive legal interpretation of the scope of the Aarhus Convention, stated that it was appropriate to have regard to the commentary of the Aarhus Convention Compliance Committee in its *Implementation Guide* (2nd ed., 2014). Citing the views of the Compliance Committee in that publication, Clarke J. stated (at para. 63) that:-

"It follows that the question of whether a national law may be a "law relating to the environment" for the purposes of Article 9.3 of the Aarhus Convention must be determined as a matter of substance rather than as a matter of form. It does not matter if the legislation in question deals with

> *other questions or has a title implying that its principal focus may be matters other than environmental provided, importantly, that the measure sought to be enforced can properly be said, in any material and realistic way, to relate to the environment."*

62. Clarke J. then addressed the particular claims sought to be made in that case which, as noted earlier, sought a range of orders designed to secure the designation of a portion of a roadway as a motorway and that certain portions of the previous roadway be restored. Clarke J. concluded (at para. 66):-

> *"It follows that the mere fact that roadways can have an environmental impact and that the purpose of environment legislation can frequently be directed towards protecting health and safety does not mean that all road traffic legislation or all health and safety legislation can be regarded as coming within the ambit of environmental law for the purposes of Article 9.3."*

63. Having analysed the claim made by the plaintiff in those proceedings, Clarke J. found that the claim could not be said to amount to an allegation of an omission by public authority in relation to "*national environmental law*". He stated (at para. 67):-

> *"The claim as pleaded does not identify any specific national measures as having been breached let alone specify any particular omissions by a public authority of compliance with a mandatory measure which comes within the ambit of environmental law even allowing for the broad definition of that term which I am satisfied ought to be applied in accordance with the guidance of the Aarhus Convention Compliance Committee."*

64. He further stated that "*even applying a generous interpretation*" to the claim made by the plaintiff, it could not be said to be one which engaged the Aarhus Convention and no suggestion was made that Directive 2011/92 (co-define *inter alia* Directive 2003/35/EC) was engaged (para. 70).

65. I have reached a similar conclusion in this case in relation to grounds (2) and (3). In my view, they do not come within the ambit of environmental law for the purposes of Article 9(3) of the Aarhus Convention. Nor, in my view, do those grounds amount to an allegation of any act or omission by a public authority of a contravention of national environmental law.

66. In conclusion, therefore, I am not persuaded by the submissions advanced by the applicant that the judgment of the CJEU in *North East Pylon* precludes me from making the costs order which I was disposed to make for the reasons set out in my second judgment. On the contrary, I am persuaded by the submissions advanced by Aeolus that the judgment of the CJEU is consistent with such an order. The CJEU has expressly endorsed the approach of separating out those grounds of a challenge which engage the public participation provisions of Directive 2011/92 and from other grounds in the case and applying the NPE requirement in Article 11(4) of that Directive only to the former grounds. The CJEU has, therefore, confirmed that, in principle, it is appropriate to separate out the grounds of a challenge in this manner. Nor am I persuaded by the applicant that the obligation to give a conforming interpretation to national procedural law and to apply the provisions of Articles 9(3) and 9(4) of the Aarhus Convention to the non-public participation grounds of the case applies in the context of this case as the non-public participation grounds are grounds which arise under national law (alleged breach of fair procedures and alleged failure to provide adequate reasons) and are not concerned with national environmental law or its application.

67. In those circumstances, I am satisfied that it is appropriate for me to make an order that the applicant pays two thirds of the costs of Aeolus for the reasons set out by me in my second judgment.

Final Orders

68. Substantial agreement has been reached between the parties on the terms of the final orders to be made (subject to the dispute in relation to costs as between the applicant and Aeolus which I have resolved in this judgment and in my second judgment). On the basis of that agreement and my decision in relation to costs, I propose making the following orders:-

> (1) An order refusing the applicant's application for an extension of time within which to apply for leave to seek judicial review of the decision of the respondent dated 6 June, 2017.
>
> (2) An order setting aside the leave granted to the applicant to seek the reliefs set forth in para. D of the amended statement of grounds granted by the High Court (Noonan J.) on 2 October, 2017.
>
> (3) No order as to costs as between the applicant and the respondent.
>
> (4) The applicant be directed to pay two thirds of the costs of the first named notice party, Aeolus Windfarms Ltd., to include all reserved costs and the costs of submissions, to be taxed in default of agreement.
>
> (5) Noting the applicant's intention to appeal, I have ruled that the applicant does not require a certificate under s. 50A(7) of the Planning and Development Act 2000 Act (as amended) to appeal

69. I will hear counsel as to whether there are any additional matters which need to be dealt with in the order.